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ARIZONA SUPERIOR COURT

YAVAPAI COUNTY

STATE OF ARIZONA,

Plaintiff,

vs.

STEVEN CARROLL DEMOCKER,

Defendant.

No. CR 2008-1339

WNI'S RESPONSE IN OPPOSITION TO STATE'S MOTION TO COMPEL *DAILY COURIER* TO PRODUCE DOCUMENTS REQUESTED IN A SUBPOENA DUCES TECUM SERVED ON OR ABOUT MARCH 5, 2009

(Assigned to the Honorable Thomas J. Lindberg)

[Hearing: June 16, 2009, 10:00 a.m.]

Pursuant to U.S. Const. amend I, Ariz. Const. art. II, § 6 and A.R.S. §§ 12-2214 and 12-2237, Western News&Info, Inc., publisher of the *Prescott Daily Courier*, ("WNI"), respectfully requests that the Court deny the State's Motion to Compel *Daily Courier* to Produce Documents Requested in a Subpoena Duces Tecum Served on or about March 5, 2009 (the "Motion"). This Response is supported by the following memorandum of points and authorities.

Preliminary Statement

To enforce well-settled constitutional and statutory rights, this Court should deny the State's Motion to compel production of privileged newsgathering materials from *The Daily Courier*'s website. Indeed, the State's Motion is based on nothing more than a prosecutor's *hunch* that these materials "*may*" provide "valuable" information related to this case. [State's Motion, at 1] Specifically, the State seeks an Order requiring WNI to produce unpublished journalistic information – including the identities of *anyone who has posted online comments* about this case – a sweeping request that violates Arizona's statutory protections for journalists, as well as state and federal constitutional safeguards.

On March 6, 2009, the State served a Subpoena Duces Tecum on WNI (the "Subpoena") that was legally invalid because it was not supported by the statutorily-required affidavit. A.R.S. § 12-2214 (the "Media Subpoena Law"). [*See* Exhibit 1, March 5, 2009 Subpoena Duces Tecum] As a matter of law, the Subpoena was of "no effect," and WNI was under no obligation to produce the requested materials. A.R.S. § 12-2214(B). The State's Motion fails to mention that WNI promptly informed the State – in detail and in writing – of its invalid Subpoena. [*See* Ex. 2, March 6, 2009 letter from David J. Bodney to Mark K. Ainley] Rather than try to cure the Subpoena's defects, the State waited three months to file a Motion asking the Court to enforce a legally defective Subpoena. A.R.S. § 12-2237. Procedurally, the State has disregarded its statutory duties, and Arizona law forbids it from compelling production of this information. *Id.*

As a matter of settled First Amendment law, compelled production of unpublished newsgathering materials from the media "is the exception, not the rule." *Shoen v. Shoen*, 48 F.3d 412, 416 (9th Cir. 1995) ("*Shoen II*"). The First Amendment confers upon journalists a strong privilege against the compelled disclosure of information gathered to report the news. The privilege recognizes that the news media can be used as a source of evidence in criminal or civil proceedings *only* as a last resort

– and only if the party seeking such testimony demonstrates that the information sought is "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; and (3) clearly relevant to an important issue in the case." *Id.* As a matter of law, the State has failed to satisfy *any* of these constitutional requirements.

Finally, the State's Motion should be denied because the information it seeks is protected from disclosure by another Arizona statute – A.R.S. § 12-2214 (the "Arizona Shield Law") By ignoring the protections of that statute, the County Attorney's Office would have this Court transform news organizations into investigative arms of the State every time they receive anonymous information about an ongoing prosecution. Such a result would turn the First Amendment on its head and lead to compelled production by the press in *every* case. As shown below, the First Amendment and Arizona law prohibit the discovery the State seeks, and the Motion should be denied.

Factual Background

On or about March 6, 2009, the State caused its Subpoena to be served upon WNI. [*See* Ex. 1] The Subpoena sought several categories of records related to WNI's coverage of the homicide of Virginia Carol Kennedy, including: (1) "All available articles with attached reader comments"; (2) "Detailed Reader Comments information. To include, but not limited to: posted date and time, posted by name, email address(es), telephone number(s), IP address(es) and/or any toher [sic] identifying or tracking information"; and (3) "Any Reader Comments which were submitted but not accepted for posting." [*Id.*]

On March 6, 2009, WNI informed the State that the Subpoena had "no effect" as a matter of law because it was served without the statutorily-required affidavit, as required by the Media Subpoena Law. [*See* Ex. 2] The letter also informed the State that WNI would not comply with the Subpoena for the following reasons: (1) the State had not attempted to obtain the information from other available sources, as required by A.R.S. § 12-2214(A)(2); (2) the Subpoena sought information protected by

the strong First Amendment privilege against third-party discovery of journalistic work product; (3) A.R.S. § 12-2237, the Arizona Shield Law, prohibits the State from compelling production of the identity of WNI's sources of information; and (4) the Subpoena, which was served on March 6 and sought compliance by March 10, 2009, failed to allow a reasonable time for compliance. [*Id.*]

The State did not respond to the March 6 letter from WNI's counsel. Three months later, on June 4, 2009, the State served a copy of its Motion to Compel on WNI. [*See* Ex. 3]

Argument

I. PROCEDURALLY, THE SUBPOENA IS LEGALLY INVALID BECAUSE IT DOES NOT COMPLY WITH THE MEDIA SUBPOENA LAW.

As WNI informed the State on March 6, the Subpoena was invalid as a matter of law because it was not supported by the statutorily-required affidavit. A.R.S. § 12-2214(A) requires that a criminal subpoena for production of documentary evidence directed to a person "engaged in gathering, reporting, writing, editing, [or] publishing" news to the public, which relates to matters within these news activities, must be accompanied by an affidavit setting forth six specific averments. Because the Subpoena was served *without* the required affidavit, it had "no effect" as a matter of law. A.R.S. § 12-2214(B). Simply put, WNI had no legal obligation to comply with the Subpoena. *Id.*

Even if the State had executed and attached an affidavit, it could *not* have satisfied the requirements of A.R.S. § 12-2214(A). For example, A.R.S. § 12-2214(A)(2) requires that the State "attempt [ ] to obtain each item of information from all other available sources, specifying which items the affiant has been unable to obtain." Similarly, A.R.S. § 12-2214(A)(3) requires the affiant to state the "identity of other sources" consulted in seeking the information sought by the subpoena. To the extent the Subpoena seeks information available from other sources – namely, copies of news articles and reader comments that were posted on *The Daily Courier*'s

website – no affidavit can cure the Subpoena. Indeed, these materials are presumably available from third party news-clipping services or from *The Daily Courier*'s website itself. In addition, as explained more fully below, the information sought appears to be of marginal relevance, and is protected by a "lawful privilege." A.R.S. § 12-2214(A)(4), (5). Because the Subpoena did not – and could not – comply with the Media Subpoena Law, the State is asking the Court to compel compliance with a legally-invalid Subpoena, and the State's Motion should be denied.

II. EVEN WITH A VALID SUBPOENA, COMPELLED DISCLOSURE OF UNPUBLISHED MATERIALS AND CONFIDENTIAL INFORMATION FROM WNI WOULD VIOLATE THE FIRST AMENDMENT.

A. The State Cannot Overcome the Strong First Amendment Privilege Against Compelled Disclosure of Unpublished Information.

Under settled First Amendment law, journalists are protected from compelled testimony and disclosure of unpublished journalistic information by a constitutional privilege that must "prevail in all but the most exceptional cases." *Shoen II*, 48 F.3d at 416 (recognizing that the vast majority of federal circuits to address this issue have found a "qualified privilege for journalists against compelled disclosure of information gathered in the course of their work"); *Shoen v. Shoen,* 5 F.3d 1289, 1292 n.5 (9th Cir. 1993) ("*Shoen I*") (observing that the First, Second, Third, Fourth, Fifth, Eighth, Tenth and District of Columbia Circuit Courts of Appeal have all recognized a qualified First Amendment privilege against the compelled disclosure of journalistic information). The privilege "protects journalists against compelled disclosure *in all judicial proceedings, civil and criminal alike.*" *Shoen I*, 5 F.3d at 1292 (emphasis added). Where, as here, a party seeks compelled disclosure of unpublished information from a newspaper, the First Amendment privilege cannot be overcome unless the State makes a specific showing that the information sought is (1) unavailable despite exhaustion of all reasonable alternative sources; (2) noncumulative; *and* (3) clearly relevant to an important issue in the case." *Shoen II*, 48 F.3d at 416. Here, the State has

failed to show that its desire to inspect the *Courier*'s files is anything approaching the "exceptional case[ ]" described in *Shoen*.

First, as noted above, the State has not demonstrated that the requested material is "unavailable despite exhaustion of all reasonable alternative sources . . . ." *Shoen II*, 48 F.3d at 416; *e.g.*, A.R.S. § 12-2214(A)(2-3). At a minimum, the State should be required to exhaust all available alternative sources of information before seeking to abrogate the journalist's First Amendment privilege. *Shoen I*, 5 F.3d at 1297 ("[C]ompelled disclosure from a journalist *must be a last resort* after pursuit of other opportunities has failed.") (emphasis added) (internal quotation marks and citations omitted). As a matter of law, the State cannot justify compelled disclosure under the first prong of *Shoen II*.

Second, the State cannot demonstrate that the material sought is non-cumulative. *Shoen II*, 48 F.3d at 416. The State theorizes that the anonymous commentators on *The Daily Courier*'s website "appear to have considerable insight regarding the murder of Carol Kennedy." [State's Motion, at 1] Yet such rank speculation cannot overcome the newspaper's First Amendment privilege. For example, it is entirely possible that the records sought from WNI will duplicate testimony from other witnesses – or existing interviews and statements. In any event, if speculation were sufficient to overcome the "noncumulative" prong of the *Shoen* test, compelled disclosure would become the rule – not the exception. *Shoen II*, 48 F.3d at 416.

Third, the State has failed to show the "actual relevance" of the information sought from WNI. *Id.* ("there must be a showing of actual relevance; a showing of potential relevance will not suffice"); *see also* A.R.S. § 12-2214(A)(4) (requiring affidavit to state that information sought is "relevant and material" to case). Again, the State speculates that "[i]nterviewing these individuals *may* well provide valuable information critical to the advancement and completion of the State's on-going investigation which cannot be obtained by alternative means." [State's Motion to Compel, at 1 (emphasis added)] As a matter of law, the State has made a showing of

potential relevance – insufficient to compel disclosure here. *Shoen II*, 48 F.3d at 416. Under *Shoen II*, compelled testimony of journalistic information is possible under the First Amendment *only* as a last resort to secure critical evidence of *actual* relevance that cannot be obtained in any other way.

The First Amendment privilege is grounded in the strong public policy against requiring members of the press to divulge unpublished information that could chill newsgathering. *E.g.*, *Zerilli v. Smith*, 656 F.2d 705, 711 (D.C. Cir. 1981) ("[T]he press' function as a vital source of information is weakened whenever the ability of journalists to gather news is impaired.") (citations omitted). Courts have identified at least four harms that would flow from compelling discovery from journalists: (1) the threat of judicial intrusion into the newsgathering process; (2) the disadvantage of a journalist appearing to be a research arm of the government or a private party; (3) the disincentive to compile and preserve non-published material; and (4) the burden on journalists' time in responding to subpoenas. *Shoen II*, 48 F.3d at 416. Given the strong public interest in the police investigation of this case – and WNI's role in providing information to the public – these concerns are particularly compelling here. For these reasons, WNI should be protected from the State's attempt to compel compliance with the Subpoena.

B. The State Cannot Overcome First Amendment Protections for Anonymous Internet Speech.

The Court should deny the Motion for the independent reason that the State has not met its First Amendment burden to compel disclosure of the identity of an anonymous author. As a matter of well-settled law, the First Amendment includes the right to speak anonymously. *E.g., McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 357 (1995) ("Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition. Anonymity is a shield from the tyranny of the majority."). The Supreme Court has recognized that the First Amendment's protections extend to the Internet. *E.g., Reno v. American Civil Liberties Union*, 521

U.S. 844, 870 (1997) ("any person with [an Internet connection] can become a town crier with a voice that resonates farther than it could from any soapbox").[1]

A growing number of courts have applied these well-settled protections to shield the identities of anonymous authors on the Internet. *E.g., Mobilisa, Inc. v. Doe 1*, 217 Ariz. 103, 170 P.3d 712 (Ct. App. 2007) (recognizing First Amendment protection for anonymous Internet commentators); *Best Western Int'l, Inc. v. John Doe*, No. CV-06-1537-PHX-DGC, 2006 U.S. Dist. LEXIS 56014, at *14, **16-17 (D. Ariz. July 25, 2006) (holding litigant failed to meet standard to compel disclosure of identity of anonymous web poster); *see also Sinclair v. TubeSockTedD*, 596 F. Supp. 2d 128 (D.D.C. 2009) (recognizing First Amendment protections for anonymous internet speech and refusing to compel Google and two other websites to reveal the identities of three individuals). One recent case explicitly recognized that a newspaper had standing to assert the rights of anonymous web-posters. *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, 2008 WL 5192386, at *2 (M.D. Pa. Dec. 11, 2008) (holding First Amendment rights of anonymous commentators barred compelling newspaper to disclose identities of individuals).

Although these cases have arisen in the civil context, they stand for the proposition that some minimum showing is required before compelling disclosure of the identity of an anonymous internet speaker. *E.g., Mobilisa*, 217 Ariz. at 112, 170 P.3d at 721 (allowing compelled discovery of anonymous internet speaker only after (1) adequate notice provided to speaker, (2) a showing that requesting party's cause of action would survive motion for summary judgment, and (3) balancing the competing interests). The State falls well short of meeting any such standard here, suggesting only

[1] The American tradition of anonymous speech dates back at least as far as Benjamin Franklin, who in 1722 published under the pseudonym "Silence Dogood," a mocking of Rev. Cotton Mather's "Essays to do good." Many of Franklin's contemporaries published pseudonymously, such as "Zechariah Hearwell" and "Jack Modish." "In the repressive atmosphere, there was a tradition of disguising your identity or publishing anonymously; it allowed for something like freedom of speech." Daniel Wolff, How Lincoln Learned to Read, 19 Bloomsburg USA (2009).

that the anonymous commentators in this case "may" have valuable information. Simply put, the State should not be allowed to upend such an "honorable tradition" as anonymous discussion of public events based on a bare showing of curiosity. *E.g.*, *McIntyre*, 514 U.S. at 357; *Godbehere v. Phoenix Newspapers, Inc.*, 162 Ariz. 335, 343, 783 P.2d 781, 789 (1989) ("It is difficult to conceive of an area of greater public interest than law enforcement.").

III. THE MEDIA SHIELD LAW PROHIBITS DISCLOSURE OF WNI'S CONFIDENTIAL SOURCES OF INFORMATION.

Controlling Arizona authority entitles WNI to an order quashing any subpoena seeking the names and contact information of anonymous commentators on WNI's website. Arizona's Media Shield Law, A.R.S. § 12-2237, provides:

> A person *engaged in newspaper* . . . or reportorial work, *or connected with or employed by a newspaper* . . . shall **not** be compelled to testify or disclose in a legal proceeding or trial or any proceeding whatever . . . *the source of information* procured or obtained by him for publication in a newspaper . . . ."

(emphasis added). Here, there can be no doubt that WNI was engaged in "newspaper" work: it published news articles about the murder of Virginia Carol Kennedy. WNI also maintained a website in which members of the public could post comments about the newspaper's coverage or the case. To the extent these comments were submitted anonymously, A.R.S. § 12-2237 provides an absolute bar to compelled disclosure. Simply put, the Shield Law prohibits the State's request for an order compelling WNI to disclose the identities of anonymous readers who posted information on *The Daily Courier*'s website.

The statute's plain language contains no exceptions. In the *New Times* "eco-terrorist" case, Judge Galati held that A.R.S. § 12-2237 stands as an *absolute bar* to compelled disclosure of the identity of a confidential source, even in grand jury proceedings, where the interests in disclosure are much greater than the speculative discovery proposed by the State here. *See In re Hibberd*, No. 262 GJ 75 (Ariz. Super.

Ct., Maricopa County, Feb. 26, 2001).[2] In *Hibberd,* despite the substantial risk to public safety posed by an at-large serial arsonist, the court concluded that A.R.S. § 12-2237 prohibited the grand jury from compelling production of an audio tape of an interview by a *Phoenix New Times* reporter with a person claiming to be a serial arsonist. *Id.* The court found the protection afforded by the Shield Law "not a close question." *Id.* If no exception existed in a grand jury matter involving an ongoing and palpable threat to public safety, then surely an exception to the absolute privilege should not be found in this case, which appears to be little more than a last-minute fishing expedition.

Conclusion

For the foregoing reasons, the Court should deny the State's Motion to Compel.

RESPECTFULLY SUBMITTED this 12th day of June, 2009.

STEPTOE & JOHNSON LLP

By _____

David J. Bodney
Chris Moeser
Collier Center
201 East Washington Street
Suite 1600
Phoenix, Arizona 85004-2382

Attorneys for Western News&Info, Inc.

[2] A copy of Judge Galati's opinion, which is no longer available on the Superior Court's website, is attached as Exhibit 4 for ready reference.

ORIGINAL of the foregoing FILED this 12th day of June, 2009, via Federal Express overnight delivery to:

Clerk of the Court
Yavapai County Superior Court
120 S. Cortez
Prescott, AZ 86303

With a COPY to be delivered to:

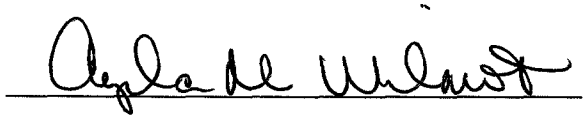
Hon. Thomas B. Lindberg
Yavapai County Superior Court
Division 6
120 S. Cortez
Prescott, AZ 86303

and COPY faxed and mailed this 12th day of June, 2009, to:

Yavapai County Attorney's Office
Joseph C. Butner
Deputy County Attorney
255 East Gurley Street
Prescott, AZ 86301

Larry A. Hammond
Anne M. Chapman
Osborn Maledon, P.A.
2929 N. Central Avenue, 21st Floor
Phoenix, AZ 85012-2793
and
John M. Sears
107 North Cortez Street, Suite 104
Prescott, AZ 86301

Attorneys for Defendant



IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, v. **STEVEN CARROL DEMOCKER,** Defendant.	NO. CR 2008-1339 Division 6 **SUBPOENA DUCES TECUM** ***(Production of Records)***

TO: **Kit Atwell, CEO** **(928) 445-3333**
Daily Courier
1958 Commerce Center Drive
Prescott, AZ. 86301

Re: The dCourier.com articles for the Virginia Carol Kennedy homicide and all known related stories. i.e: Steven DeMocker and James Knapp, from initial story posted on 7/3/08 to present.

YOU ARE HEREBY ORDERED to appear at **11:00 a.m.** on **Tuesday, March 10 , 2009**, at the Superior Court (Division 6) in the Yavapai County Courthouse in Prescott, Arizona, and to remain there until excused by the Judge conducting the proceeding, to give testimony on behalf of the State of Arizona, **and bring with you**:

Requested Information:

1. **All available articles with attached reader comments.**
2. **Detailed Reader Comments information. To include, but not limited to: posted date and time, posted by name, email address(es), telephone number(s), IP address(es) and/or any toher identifying or tracking information.**
3. **Any Reader Comments which were submitted but not accepted for posting.**

Given under my hand this 5 day of March, 2009.

SHEILA SULLIVAN POLK
YAVAPAI COUNTY ATTORNEY

IF YOU FAIL TO APPEAR AS ORDERED, A WARRANT WILL BE ISSUED FOR YOUR ARREST.

By _____
MARK K. AINLEY
Deputy County Attorney

PLEASE CALL SEAN AT (928) 777-7411 ON MONDAY, MARCH 9, 2009, BETWEEN 4:00 AND 5:00 P.M. TO CONFIRM DATE.

CERTIFICATE OF SERVICE

The undersigned swears that he is qualified to service this subpoena and did so by showing the original to and informing the witness of its contents and by delivering a copy thereof to him at _____ __.m. on _____, 2009, at _____, Arizona.

_____
Person Serving Subpoena

SUBSCRIBED AND SWORN to before me on _____, 2009.

_____
Notary Public

My Commission Expires:

_____

STEPTOE & JOHNSON LLP
ATTORNEYS AT LAW

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March 6, 2009

VIA FACSIMILE
AND U.S. MAIL

Mark K. Ainley
Deputy County Attorney
Yavapai County Criminal Justice and Detention Center
255 East Gurley Street
Prescott, Arizona 86301

Re: Western News&Info, Inc./Subpoena Duces Tecum to Kit Atwell of *The Daily Courier*
State v Democker, Yavapai County Super. Ct. Case No. CR2008-1339

Dear Mr. Ainley:

This firm represents Western News&Info, Inc. ("WNI"), publisher of *The Daily Courier*. In that capacity, I write in response to the Subpoena Duces Tecum that you caused to be served on WNI on March 6, 2009. The Subpoena seeks several categories of records related to WNI's coverage of the homicide of Virginia Carol Kennedy, including: (1) "All available articles with attached reader comments"; (2) "Detailed Reader Comments information. To include, but not limited to: posted date and time, posted by name, email address(es), telephone number(s), IP address(es) and/or any toher [sic] identifying or tracking information"; and (3) "Any Reader Comments which were submitted but not accepted for posting." For the following reasons, the Subpoena is insufficient to compel the production of records from WNI or the appearance of Kit Atwell in court next Tuesday.

First, the Subpoena is invalid as a matter of law because it is not supported by the statutorily-required affidavit. A.R.S. § 12-2214(A) requires that a criminal or civil subpoena directed to a person engaged in gathering, reporting, writing, editing, publishing or broadcasting news, which relates to matters within these news activities, must be accompanied by an affidavit setting forth six specific averments. Because the Subpoena was served without the required affidavit, it has "no effect" as a matter of law. A.R.S. § 12-2214(B).

Second, the Arizona Media Subpoena Law requires that you "attempt[ ] to obtain each item of information from all other available sources" before compelling production from WNI. A.R.S. § 12-2214(A)(2). To the extent you seek copies of articles that WNI has published, copies may be available from third-party news clipping services or from *The Daily Courier*'s website, www.dcourier.com.

Third, journalists enjoy a strong First Amendment privilege against third-party discovery. *Shoen v Shoen*, 48 F.3d 412 (9th Cir. 1995). In *Shoen*, the Ninth Circuit held that a litigant seeking a journalist's non-confidential work product must show that the material is: "(1) unavailable despite exhaustion of all reasonable alternative sources; (2) non-cumulative; and (3) clearly relevant to an important issue in the case." *Id.* at 416. Evidence satisfying each prong of the test, even in criminal cases, is necessary to compel production. *Id.* The Ninth Circuit has made clear that the journalist's privilege cannot easily be defeated: "Indeed, if the privilege does not prevail in *all but the most exceptional cases*, its value will be substantially diminished.'" *Id.* (quoting *Zerilli v. Smith*, 656 F.2d 705 (D.C. Cir. 1981) (emphasis added)). Here, no attempt has been made to satisfy any prong of the *Shoen* test.

Fourth, the Arizona Shield Law protects any person engaged in newspaper, radio, television or reportorial work, or connected with or employed by a newspaper, radio or television station from being compelled to testify or disclose in a legal proceeding the source of information obtained for newsgathering purposes. A.R.S. § 12-2237. Arizona law therefore prohibits your request for WNI to disclose the names and contact information of readers who provide information to WNI.

Finally, the Subpoena fails to allow reasonable time for compliance. The Subpoena was served this morning, on March 6, 2009, yet it contains a compliance date of March 10, 2009 – a mere two court days later. Even if the Subpoena did not suffer from the defects cited above, there would be insufficient time for a party exercising reasonable diligence to comply. The Subpoena is therefore objectionable.

For the foregoing reasons, the Subpoena has no effect as a matter of law, and WNI will not produce records at 11:00 a.m. on March 10, 2009, nor will Ms. Atwell appear to give testimony. In addition, I caution you against trying to satisfy the conditions of A.R.S. § 12-2214 by rote. Coupled with the First Amendment protections, the statutory requirements are serious hurdles to your client's ability to compel privileged testimony from WNI.

If you care to discuss these objections, please contact me directly.

Very truly yours,

David J. Bodney

YAVAPAI COUNTY ATTORNEY'S OFFICE
JOSEPH C. BUTNER SBN 005229
DEPUTY COUNTY ATTORNEY
255 East Gurley Street
Prescott, AZ 86301
Telephone: 928-771-3344

IN THE SUPERIOR COURT OF STATE OF ARIZONA

IN AND FOR THE COUNTY OF YAVAPAI

STATE OF ARIZONA, **Plaintiff,** **v.** **STEVEN CARROLL DEMOCKER,** **Defendant.**	**CR 2008-1339** **Division 6** **STATE'S CERTIFICATE OF SERVICE RE:STATE'S MOTION TO COMPEL DAILY COURIER TO PRODUCE DOCUMENTS REQESTED IN SUBPOENA *DUCES TECUM***

A copy of the State's Motion to Compel Daily Courier to Produce Documents Requested in the Subpoena *Duces Tecum* dated on or about March 5, 2009, and the minute entry setting date and time for Hearing on the issue were hand delivered this 4th day of June, 2009, to:

Kit Atwell, Publisher
The Daily Courier
1958 Commerce Center Drive
Prescott, AZ 86301

RESPECTFULLY SUBMITTED this 4th day of June, 2009.

Sheila Sullivan Polk
YAVAPAI COUNTY ATTORNEY

By: _____
Joseph C. Butner
Deputy County Attorney

///

///

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

COPY of the foregoing delivered this 4th day of June, 2009 to:

Honorable Thomas J. Lindberg
Division 6
Yavapai County Superior Court
(hand delivered)

John Sears
107 North Cortez Street, Suite 104
Prescott, AZ 86301
Attorney for Defendant
(via Courthouse box)

Larry Hammond
Anne Chapman
Osborn Maledon, P.A.
2929 North Central Ave, 21st Floor
Phoenix, AZ
Attorney for Defendant
(via USPS)

Kit Atwell, Publisher
The Daily Courier
1958 Commerce Center Drive
Prescott, AZ 86305
(via USPS)

By: Debb Counsell

Office of the Yavapai County Attorney
255 E. Gurley Street, Suite 300
Prescott, AZ 86301
Phone: (928) 771-3344 Facsimile: (928) 771-3110

COURT RULINGS

Honorable Frank T. Galati
Filed: 2/26/2001 **Case Number:** 262 GJ 75

Plaintiff **Prosecution**
In the Matter of James Hibberd

v.

Defendant **Defense**

IN THE MATTER OF THE APPEARANCE AND ATTENDANCE BEFORE THE GRAND JURY RE: JAMES HIBBERD MINUTE ENTRY

James Hibberd's and New Times, Inc.'s motion to quash subpoena duces tecum was argued and taken under advisement on February 22, 2001.

The court took the matter under advisement so that certain of the cited cases could be read.

That has now been done.

I. BACKGOUND. Most of the salient facts are not in dispute.

In the recent past in this county, several homes being constructed near mountain preserve areas have been set afire.

Law enforcement officials believe that these fires are the work of an arsonist.

Mr. Hibberd wrote a story about the subject, which Phoenix New Times published.

Afterward, Mr. Hibberd was contacted by and subsequently met with and interviewed a person who claimed to be the arsonist.

After that interview, Phoenix New Times published another story by Mr. Hibberd.

That story gave voice to the arsonist and contained information provided by the arsonist, who remains at-large today. _____ 1. Those cases are Branzburg v. Pound, 461 S.W. 2d 345 (Ky. App. 1970); Lightman v. Maryland, 15 Md. App. 713, 294 A.2d 149 (Md. App. 1972); State v. Knops, 49 Wis. 2d 647, 183 N.W. 2d 93 (1971). _____ Thereafter, the Maricopa County Grand Jury issued and caused to be served upon Mr. Hibberd a subpoena duces tecum requiring him to produce certain evidence.

At oral argument, Mr. McMurdie forthrightly stated that the grand jury wants production of the tape-recorded conversation which Mr. Hibberd had with the arsonist, it wants Mr. Hibberd's notes and it wants various computer and electronic data.

All of this is sought in order to identify the person who represented himself to Mr. Hibberd as being the arsonist or to aid the state in proving which, if any, of its current suspects is, in fact, the arsonist. II. DISCUSSION. While each side has advanced multiple arguments in support of its position, the court finds the determinative issues to number only two.

The first issue to be resolved is what law governs.

As the court stated at oral argument, it is Arizona's "press shield law," A.R.S. §12-2237, which is controlling.

The court does not find that it needs to or should resort to either the First Amendment to the United States Constitution or to any provision of the Arizona Constitution. In relevant part, §12-2237 says this:

"A person engaged in newspaper . . . reportorial work . . . shall not be compelled to testify or disclose in a legal proceeding . . . or before any jury, inquisitorial body . . . or elsewhere, the source of information procured or obtained by him for publication in a newspaper . . . with which he was associated or by which he is employed."

2. The state argued in its papers that Mr. Hibberd and New Times, Inc. waived any claim to privilege by granting interviews and discussing the matter publicly.

The court rejects this argument because nothing before the court suggests that Hibberd or New Times has revealed to any third party what they now seek to shield from the grand jury.

The determinative issue presented by §12-2237 is whether the arsonist, as an at-large criminal, may be recognized as a "source of information" within the meaning of the statute.

The state argues that despite the statute's silence on the issue, "the source of information" may not be such a perpetrator. No Arizona appellate courts have interpreted §12-2237, but in a case involving a subpoena served upon a person who claimed to be a journalist, the Arizona Court of Appeals stated well-known rules of statutory construction, as follows:

"Our primary task is to give effect to legislative intent.

[citation omitted].

In attempting to divine legislative intent, we must give the language of the statute its plain and

ordinary meaning . . . [citation omitted]." Matera v. Superior Court, 170 Ariz. 446, 448, 825 P.2d 971, 973 (App. 1992).

The "plain and ordinary meaning" of the words most germane here give this court no pause: the arsonist unquestionably is "the source of information," irrespective of his status as an at-large criminal.

As such, Hibberd and New Times, Inc. are clearly entitled to assert the privilege afforded them by the Arizona legislature.

This is not a close question. The state argues that sound public policy requires that this court read the legislature's plain words to exclude a person such as the arsonist from the operation of Arizona's legislatively-enacted press shield law.

In so arguing, the state relies upon Branzburg v. Pound, supra, and Lightman v. Maryland, supra.

But the state's argument is rejected on two grounds. First, whether there should be a "press shield law" and the extent of its reach is a matter of public policy to be decided by the legislature, not by this or any other Arizona court.

At common law, no privilege existed in favor of communications made to newsmen.

Branzburg v. Pound, 461 S.W.2d at 347.

Arizona's statute has been the law since at least 1937.

Matera v. Superior Court, 170 Ariz. at 449, 825 P.2d at 974.

It is not for the judicial branch to modify the plain language of a 64 year old statute because the court may believe that something else better serves the public.

The wisdom of the choices made by the legislature is simply not a matter for judicial scrutiny. Second, the cases

relied upon by the state simply do not stand for the legal propositions advanced by the state.

In Branzburg, the reporter "saw the commission" of crimes and wrote about what he saw.

461 S.W.2d at 346.

The Kentucky court held that Kentucky's press shield law ". . . grants a privilege from disclosing the source of the information but does not grant a privilege against disclosing the information itself." Id. at 347.

Branzburg found that a reporter who witnesses others commit a crime and reports about it is his own source even if one of the criminals is the same person who informed the reporter that a crime would be committed. Lightman is much the same.

There, a newspaper reporter investigated an apparent "head-shop" and witnessed shopkeepers providing marijuana to customers.

Again, the Lightman reporter witnessed criminal activity and, therefore, could not claim the privilege.

The court said: " . . . the situs of the criminal activity, and the persons participating in it, was in this case, part of the information obtained by the [reporter] through his own personal observations and, consequently, neither the identity of the shopkeeper nor the location of the shop constituted the 'source' of the news or information published . . ." Lightman v. State, 15 Md.App. at 725, 294 A.2d at 157.

Lightman and Branzburg teach that Mr. Hibberd would properly be denied the protection of §12-2237 had he, for example, accompanied the arsonist to an arson, even if the arsonist had informed Mr. Hibberd of the date, time, and place of the crime and had personally invited him along.

Under those hypothetical circumstances, Hibberd would be the source of information for his reporting and no privilege would attach.

But Hibberd did nothing remotely akin to what is described in Lightman or Branzburg.

And, once again, the court finds that this is not a close question. III. CONCLUSION. Having found that the arsonist is a "source of information" under Arizona law, Hibberd and New Times, Inc. are entitled to exercise the privilege granted to news media by the Arizona legislature.

Just as the wisdom of the legislature's decision to grant a limited privilege to the press is not a matter for judicial scrutiny, neither is the wisdom of New Times' decision to value pursuit of a story over the safety of the citizens of Maricopa County.

New Times could have gone to the authorities immediately after being contacted by a person who claimed to be burning homes and endangering citizens, firefighters and others, but it did not.

Instead, it chose to give a public platform to a criminal, a criminal who remains on the loose and who remains a threat to the general public.

Making that choice violated no laws, but this court strongly suspects that to the average citizen, it appears that New Times placed its own self-interest far above the safety of the public it claims to serve.

Accordingly, this ruling should not be construed as approving of any decision made by Hibberd or New Times.

Nevertheless, the court's obligation to apply §12-2237 as plainly written is not dependent upon its finding that New Times has responsibly exercised its freedom. For the reasons set forth above,

IT IS ORDERED

granting James Hibberd's and New Times, Inc.'s motion to quash subpoena duces tecum.

_____ 3. Of course, a free press in a free society properly exercises its prerogatives without regard to whether any official in any branch of government "approves."